② THE

MADRAS LAW JOURNAL.

II] SEPTEMBER [1955

RECRUITMENT TO THE JUDICIARY

BY

R. S. SRINIVASACHARYA, M.A., B.L., *Advocate, Madras.*

The work before the Setalvad Commission has been broadly outlined in these columns earlier (*ante* pages 29 to 32.) It was stated then that more submissions could be made as and when a questionnaire was issued. Two of the subjects specifically mentioned in Law Minister Biswas's speech, as before the Commission, could, however, be dealt with even now: "Recruitment to the Judicial Service" and "Legal Education". This article deals with the first of these two.

INTRODUCTION.

The subject under notice is as important as it is interesting and, in competent hands, can be well dealt with in a full volume. In these columns, however, a brief outline alone is possible. The profession will remember that, a few years back, a Joint Memorandum was submitted to the Union Government by the Chief Justice of India and the Chief Justices of seven High Courts. That document has never been released to the public, but, it has been said that it related, *inter alia,* to the very question under notice in this article. It can also be recalled that Dr. Katju, when he was Home Minister, had to tell Parliament that great care was being taken in the recruitment of Judges to the Supreme Court and to the High Courts.

GENERAL OBSERVATIONS.

The Legislature, the Executive and the Judiciary are three vital component parts of the mechanism of any modern State. Smooth working of these vital organs of Government requires that a perfect equipoise should be constantly maintained among them: a slight tilt of this balance would lead to undesirable repercussions. And among these three, competent opinion has always considered the Judiciary as *"Prinus inter pares"*. To play its part fully, the Judiciary must be manned by competent personnel and also men of integrity. And, its members should be allowed to function in an entirely independent atmosphere and without fear or favour. These principles which are of general application are recognised in all modern States. However, one has to note with some alarm a growing tendency to interfere in various ways with the free functioning of the Judiciary. Such interference takes various forms, (*i*) interference in individual matters, as Dr. Malan of South Africa unsuccessfully attempted to do with Cent-Livers, C.J., with a request to stay pronouncement of judgment in an important matter between the Government and the citizen, (*ii*) attempt to create an overriding "Judicial

Body" even superior to the Supreme Court, as was done, again in South Africa by Prime Minister Malan with his new concept of a "High Court of Parliament", (*iii*) an attempt to "swamp" the Court as was threatened by President Roosevelt when he found the Supreme Court of the United States of America an inconvenient obstacle to the Government's "New Deal" policies, (*iv*) sudden dismissal of Judges, as was done in Soviet Russia in 1954, shortly after the demotion of Prime Minister Malenkov, when seven Judges of the Supreme Court were suddenly relieved of their duties and substituted by eleven, and (*v*) slicing of the normal domain of Courts, as has been done in free India by the Fourth Amendment of the Constitution. It has to be observed that Regulations and Rules regarding recruitment to the Judicial Service would be of little use if interference is made by the Executive Government with the working of the Judiciary, whatever form such interference may take.

A Brief Retrospect.

In ancient times, the King was also the Judge, as he was also, the Commander-in-Chief. It was only far later that the concept of a separate body of Judges came to be evolved. In England, one hears of such a body of Judges from the 12th century onwards. Judges were entirely the protege of the King. In the 16th and 17th centuries one finds Judges actually fighting the King. It was not till the 19th century that a regular hierarchy of Judges came into being in England. British India closely followed the English model in the establishment of a judicial set-up with important variations to be noticed below.

The Anglo-Indian Practice.

However interesting this subject might be, it is not possible nor necessary in these columns to go back beyond the Government of India Act, 1935 (26 Geo. V, Ch. 2), on which free India's Constitution, in respects of the judicial system, is entirely based. It is enough to refer to five sections of the 1935 Act, sections 200, 220, and 254 to 256, inclusive. As stated, they provide the pattern for free India's judicial system and provide for a graded hierarchy with different prescriptions for recruitment to the four main judicial offices, the Federal Court, the High Court, District Judges, "the subordinate Civil Judicial Service" and also "the subordinate Criminal Magistracy".

The Present Position.

The Indian Constitution, following the 1935 Act, provides for a graded judicial hierarchy and prescribes also for different methods of recruitment in respect of each cadre. Here again, it is unnecessary to do more than refer the learned profession to Chapters IV and V of Parts V and VI respectively and, in particular, to Articles 124, 127, 214, 217 and to the fasciculus of Articles grouped under the heading "Subordinate Courts". (Articles 233-237 inclusive.)

Dominant Features.

Certain dominant features of the present methods of recruitment for all levels may now be mentioned: (*i*) The executive Government virtually makes all judicial appointments at all levels. Though, the Constitution declares that the appointing authority is the President in the case of the Judges of the Supreme Court and that of the High Court and the Governor of the State fills a similar position, in respect of the manning of "Subordinate Courts", the true position would appear to be that in both cases, it is virtually the executive Government that really approves of the selection. The President and the Governor are both, under the Constitution, mere Constitutional Heads and, it would seem, have neither an independent nor, much less, an overriding control over the selection. (*ii*) There is a regular hierarchy of Judges, of a larger number of categories than under the

English practice. (*iii*) Promotion from one cadre to the next superior one is the normal method of recruitment to all but the lowest category, but such promotion gets restricted when recruitment is made to the High Court and to the Supreme Court. (*iv*) A certain amount of consultation is required at all levels. Thus, when the President appoints puisne Judges of the Supreme Court, he is required to consult the Chief Justice of India and such other Judges of the Supreme Court and of the High Courts, as he "deems necessary." Similarly, when he makes an appointment of a puisne Judge of a High Court he is expected to consult the Chief Justice of India, the Governor of the State concerned and the Chief Justice of that State High Court. Likewise, the High Court "recommends" persons for appointment as District Judges and the Governor is expected to consider such recommendations. Lastly, in the case of still inferior Civil Judicial posts, the State Public Services Commission makes out a list from out of which the Governor selects. But these lists themselves are made out under rules framed by the Governor in consultation with the relevant High Court and the Services Commission. (*v*) But, such consultation, it is apprehended, is purely advisory and not compulsory.

A FEW CARDINAL PRINCIPLES.

It is submitted that certain fundamental principles ought to be borne in mind if a truly competent and independent judiciary is to be recruited. (1) The executive Government should not have any voice in the selection of judicial personnel ***at any level***. (2) Formal appointment alone should vest in the President who must be required to accept persons recommended, unless such persons are objectionable on any ground. (3) Merit must be the only consideration governing recruitment at any level and every other consideration must be rigorously excluded. (4) Judicial service, except at the village panchayat or honorary magistracy level, must be of an All-India character. (5) The existing graded hierarchy has worked well both under Anglo-Indian auspices and to-day as well and there seems to be no reason for altering or modifying such arrangement. (6) Different considerations would appear to apply to recruitment to the High Court and to the Supreme Court. This would appear to require a separate treatment, but the foregoing six points in this paragraph can be amplified in a single paragraph which follows.

Interference by the executive Government at any stage with the judicial machinery must be deprecated, and, most certainly, at the stage of recruitment. Such interference would necessarily affect the independence of the Judiciary. Entry to judicial service must be based on the results of competitive examinations for any office below the level of the High Court and it is somewhat surprising that no suggestion for such a method of recruitment has been seriously made from any responsible quarter. There seems to be no reason why an All-India Judicial Cadre could not be set up on the model of the I.A.S., and why competitive examinations could not be held under rules prescribing adequate standards. Article 312 (1) of the Constitution enables the formation of the suggested type of Judicial Service. If this suggestion were to be adopted, certain advantages may be expected, (i) the elimination of the influence of the executive Government (ii) the creation of a new service of an All-India character in one of the most important sectors of public activity and (iii) a very satisfactory method of recruiting competent personnel upto and inclusive of the rank of District Judges.

THE SUPREME COURT AND THE HIGH COURT.

Totally different considerations would appear to apply to the case of recruitment to these two Courts. Fresh blood and fresh talent would appear to be necessary in these two exalted atmospheres. While a certain percentage may be

reserved for District Judges and Judges of the High Court in the High Court and the Supreme Court respectively a much larger percentage would appear to be necessary to be reserved for direct recruitment from the Bar and the selecting authority should be the Chief Justice of the Court concerned. He can be naturally expected to assess the relative merits of suitable personnel and to recommend appropriate names to the President whenever the occasion arises. The President must be expected, except for the gravest of reasons to be recorded in writing, to accept the recommendation of the Chief Justice of India so far as the Supreme Court is concerned and of the Chief Justice of a High Court where his recommendation is endorsed by the Chief Justice of India as well. If such endorsement is not available, the President would have to request the Chief Justice of the High Court to make another recommendation for acceptance. The office of the Chief Justice of India is as exalted as that of the Lord Chancellor of England and there is every reason for accepting implicitly the recommendations of this high judicial personage.

Judicial Autonomy.

Whatever may have been the reasons that might have prompted the authors of the Government of India Act to vest the executive Government with powers of appointment and, in the case of District Judges, the right to "post and promotion" as well, it seems to be necessary to-day to adopt a different rule. Under the 1935 Act, Members of the Indian Civil Service were eligible for appointment to the High Court Bench, though not to the Federal Court (section 220). Free India has rejected members of the Administrative Service from the judicial machinery and one hopes that rejection will be maintained permanently. Even under the present Constitution, the High Court has no jurisdiction over the appointment, or the posting or promotion of District Judges and in the case of the Judicial Offices below that of a District Judge, the High Court gets control only after those offices are filled up. There appears to be no reason for preserving the relics of foreign and bureaucratic administration and for denying to the highest Court in a State its legitimate powers, namely, control over all ranks of judicial officers including District Judges.

The Place of the Bar.

It would have been observed that no mention of the Bar has been made with reference to the recruitment to the judiciary at any level. It is submitted that the omission is deliberate. The Indian Bar, though it has earned great and deserved appreciation from all quarters, must wait for some more time before it could be entrusted with the authority to recruit judicial personnel. The English Bar, with its longer traditions, has not got this power and there seems to be little reason for applying a different yard-stick to the Indian Bar.

Conclusion.

The submissions made in the foregoing paragraphs do not certainly represent the last word on the subject and the writer, duly conscious of that fact, has only presented the above tentative suggestions for consideration by the learned profession. It has to be added finally that if the suggestions put forward are accepted, an Amendment of the Constitution itself would become necessary. That, of course, can be had whenever necessary.